Supreme Court, U.S.
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No. 07-207

In The

Supreme Court of the United States

NANCY FEARON-HALES,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Second Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Was the cooperator witness coached in giving trial testimony in violation of due process of law?

2. The jury was not competent to compare voice recordings in the foreign, obscure language of Twi.

TABLE OF CONTENTS

	Page
Questions Presented	i
Table of Authorities	iii
Opinion Below	1
Jurisdiction	1
Relevant Constitutional & Statutory Provisions	1
Statement of the Case	1
Reasons for Granting the Writ	5
Conclusion	8

TABLE OF AUTHORITIES

Page

FEDERAL STATUTES

28 U.S.C.A. sec. 1254 1

Federal Rule of Criminal Procedure Rule 701 7

OPINION BELOW

The Summary Order of the United States Court of Appeals for the Second Circuit, Dated May 21, 2007, is submitted herewith as *Appendix "A"*.

JURISDICTION

This matter is On Writ of Certiorari to the United States Court of Appeals for the Second Circuit. The Judgment of that Court was entered May 21, 2007.

The statutory provision conferring upon this Court jurisdiction to review the judgment of the Court of Appeals by Writ of Certiorari is 28 U.S.C.A. sec. 1254.

RELEVANT CONSTITUTIONAL & STATUTORY PROVISIONS

1. Petitioner was denied Due Process of Law pursuant to the dictates of the Fifth Amendment to the United States Constitution which states in relevant part:

> "No person shall be held to answer . . . , nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation."

STATEMENT OF THE CASE

This matter was on direct appeal to the United States Court of Appeals for the Second Circuit from a Judgment of the United States District Court for the Southern

District of New York (Swain, J.). That Judgment was entered on or about October 21, 2005. Petitioner was convicted following a jury trial of the single count of the indictment. Count One charged a conspiracy to import heroin into the United States. Petitioner was sentenced to 151 months incarceration, a supervised release term of 5 years, a $1500 fine, and a $100 special assessment.

The District Court determined the appropriate advisory Sentencing Guideline to be 34 at Criminal History One [a range of 151-188 months incarceration].

At trial the Government presented evidence from two witnesses, Alexander Becker and Nak Kusi, who were alleged to be petitioner's co-conspirators in the narcotics scheme. Becker testified live in the U.S. Courtroom, Kusi testified by a video conference from Germany. For their roles, Becker was sentenced to 3 years and 6 months in Germany, and Kusi was sentenced to 6 years and 3 months. Their sentences could be reduced depending on a variety of circumstances. Both persons had "no prosecution" agreements with the United States Government when they testified against petitioner.

Kusi was a European drug courier who transported drugs in shoes. Kusi testified that a woman he knew as Nancy contacted him, and offered Kusi the opportunity to make more money. Kusi then contacted Alexander Becker, and the two met with Nancy in London. At the meeting Kusi was instructed to travel with Becker to Ghana, and there they would be met by a man named Kwabena. Kwabena supplied the two with shoes loaded with heroin, and then Kusi and Becker returned to Europe, and then flew on to New York.

Kusi and Becker met with petitioner before their second smuggling trip to New York as well. Kusi testified

he was asked by petitioner to make a third trip, but Kusi was arrested before he could do so.

According to Kusi, petitioner instructed him to fly separately when traveling with Becker, but Kusi should travel on the same flight when traveling with his girlfriend Lydia Kofah, because "it would look better". Kusi discussed the conspiracy with German and American law enforcement after his arrest, and deliberately lied about certain case facts at the meetings, although Kusi could not "recall exactly" what he lied about.

While Kusi identified petitioner in Court as Nancy, he admitted he only saw Nancy 3-4 times at most, and could not say whether Nancy had any outstanding facial characteristics.

Lydia Kofah accompanied Kusi on his first smuggling trip to London, and was to travel with Kusi from Frankfurt to New York on the day of their arrest. Kofah then spent 2 months in jail, but was then released. The outcome of Kofah's criminal case had not been decided when Kusi testified against petitioner.

Although the cell telephone calls of Kusi were intercepted in Germany, Kusi never referred to the female conspirator on the other end of a call as Nancy, but only referred to the female voice as "auntie."

Western Union records introduced showed wire transfers of small sums from "Nak Ama" to Kusi, with Ana's listed home address the same as petitioner's in London [17 Oxley's Road, London, England].

The case investigation began in April, 2003, when Alexander Becker walked into the police station in Leverkusen, Germany, confessed his narcotics crimes, and

surrendered. Thereafter, German police obtained an order to wiretap the cell phone of Kusi. The tap continued until May 9, 2003, when Kusi was arrested at the Frankfurt airport about to leave on a flight to New York to smuggle approximately 969.5 grams of a Southeast Asia type heroin concealed in his shoes, in the company of his girlfriend Lydia Kofah.

Alexander Becker testified that in September, 2002, he was recruited by his school friend Patrick Gobel to smuggle drugs in shoes. Gobel introduced Becker to Kusi. In November, 2002, Kusi and Becker traveled to London to meet "Nancy" and thereafter were to travel to Ghana. Becker stated he and Kusi then met a "black woman, maybe the same size like me, and a little bit heavier" at the London airport. Kusi and Becker followed Nancy to a hotel room. Two hours later Nancy woke the two up, and Nancy drove them to the airport for their flight to Ghana.

Becker obtained the heroin loaded shoes, and flew back to Germany. One week later Becker traveled with the heroin to New York. In January, 2003, Becker met with Nancy for 2-3 hours at an apartment in Hamburg, Germany. While discussing the smuggling operation, Nancy proposed to Becker that he marry Nancy's sister so the sister could get German citizenship. Becker then traveled to Ghana alone, obtained the loaded shoes from Kwabena, and flew back to Germany. Becker and Kusi then flew to New York. They traveled separately.

After Becker was arrested, he physically described to German police the person he knew as Nancy. Becker stated that Nancy had scars under her eyes, which was common in Ghana. In a face to face courtroom identification Becker stated petitioner did not have scars under her

eyes, and could not identify petitioner as the person he knew as Nancy.

Petitioner was arrested at the Los Angeles airport on April 1, 2004, and was carrying no contraband. After her arrest petitioner told the agent she previously traveled to Thailand to purchase items for retail sale, and traveled to New York multiple times to visit with family. Petitioner also stated she was wanted for questioning in Ghana.

REASONS FOR GRANTING THE WRIT

REASON ONE: Witness Kusi was coached by his attorney, and others while actually giving testimony at petitioner's trial.

In his video closed circuit testimony in Germany during petitioner's trial witness Kusi was coached by his attorney so he could then answer questions on cross examination. Whether Kusi was coached repeatedly, or at least on more than 2 occasions is impossible to determine because only Kusi was wired for sound. However, the video portion of the Kusi testimony showed he was coached before answering on at least 2 occasions.

The first instance was when Kusi was asked on cross-examination the following question, and the telecast showed his attorney coaching Kusi in answering the question [t303]:

> "Q. Do you know anything about the dates and the times of the trips that you have testified to?"

The District Court Judge then told the German attorney to stop coaching witness Kusi.

Thereafter, the video telecast again showed Kusi being coached in his testimony. This time he was coached by his interpreter in Germany.

While all of this was happening the Judge presiding in Germany over Kusi's video testimony did, or said absolutely nothing. From the video transmission it is impossible to tell to what further extent Kusi's testimony was coached. It is clear that the German Judge presiding in Germany had no understanding of U.S. Federal Procedure, and was not presiding in a meaningful way so as to prevent the abuse of American procedural safeguards in the German Courtroom. The German Judge's only obvious role was to place Kusi under oath at the end of his testimony as is required procedure in a German proceeding.

The coaching of Kusi could only be discovered when it was captured on the video transmission. The full extent of the coaching could not be discovered by audio transmission.

Kusi was the only witness at petitioner's trial who claimed petitioner was "Nancy." Because of the video procedure employed at petitioner's trial, and the coaching of Kusi, Kusi's testimony is inherently unreliable for United States trial purposes.

The Court of Appeals decision fatally overlooks the fact that Kusi's testimony was given by a teleconference, and it was impossible to see the full extent of the coaching impropriety from the projected television image. Lastly, the Court of Appeals decision overlooks the fact that Kusi was the only witness coached, and the only witness who testified that petitioner was the drug conspirator "Nancy."

REASON TWO: Over petitioner's objection the District Court permitted a prison tape of petitioner actually speaking in the Twi language to be played so the jury could determine if petitioner's voice on the prison tape was the same as the "Nancy" speaking in the Twi language on the intercepted calls over Kusi's cell phone.

Exhibit GX201, was a telephone call recorded at the Metropolitan Correction Center on April 2, 2005, of petitioner actually speaking in the Twi language to a male person. However, the District Court identified to the jury the language spoken on the tape as being "foreign." GX201 was then introduced for the purpose of the jury making a voice comparison between GX201, and the GX27 series of the woman identified by Kusi as "Nancy" talking in the Twi language over Kusi's cell phone. The jury was being asked to give its opinion as lay witnesses whether the voices matched.

Federal Rule of Criminal Procedure Rule 701 [Opinion Testimony by Lay Witnesses], requires at subsection (c) that the opinion be:

> "not based on scientific, technical, or other specialized knowledge within the scope of Rule 702."

Here, this jury had no specialized knowledge in the Twi language, and, or the voice intonations associated with the Twi language. Further, this jury did not even know if petitioner was speaking the Twi language in GX201 to permit a meaningful comparison to the voice speaking in Twi in the GX27 series possible. This jury could not perform a lay witness function because it was beyond their knowledge to be able to do so. The jury had no qualification to make a comparison of voices speaking in an obscure foreign language. The procedure permitted

by the District Court was a violation of Due Process of Law. The erroneous lay witness procedure was particularly harmful in light of the fact that witness Becker did not identify petitioner as the "Nancy" he saw with "scars under the eyes," and who asked Becker to marry her sister.

If a jury is generally competent to compare voice recordings with authenticated specimens, without expert testimony, it is because a juror is familiar with voice patterns, accents, and tone based on his or her everyday life experience, and an expert witness could not magnify, or improve upon that familiarity. However, when the language being spoken is one unfamiliar to a jury, the jury does not have like experience with related voice patterns, accents and tones sufficient to make a meaningful voice comparison.

CONCLUSION

For the foregoing reason a writ of certiorari should issue to review the judgment of the United States Court of Appeals for the Second Circuit.

DATED: August 15, 2007.

Submitted by,

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APPENDIX A

UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

SUMMARY ORDER

At a stated term of the United States Court of Appeals for the Second Circuit, held at the Daniel Patrick Moynihan United States Courthouse, 500 Pearl Street, in the City of New York, on the 21st day of May, two thousand seven.

PRESENT:

HON. RICHARD J. CARDAMONE,
HON. CHESTER J. STRAUB,
HON. J. CLIFFORD WALLACE,*
Circuit Judges.

UNITED STATES,

Appellee,

-v.-

NANCY FEARON-HALES

Defendant-Appellant

No. 05-5999-cr

(Filed May 21, 2007)

Virginia Chavez Romano & Katherine Polk Failla, Assistant United States Attorneys (Michael J. Garcia, United States Attorney for the Southern District of New York, *on the brief*), New York, NY, *for Appellee*.

B. ALAN SEIDLER, New York, NY, *for Defendant-Appellant*.

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* The Honorable J. Clifford Wallace of the United States Court of Appeals for the Ninth Circuit, sitting by designation.

AFTER SUBMISSION AND UPON DUE CONSIDERATION, it is hereby ORDERED, ADJUDGED, AND DECREED that the judgment of the District Court is AFFIRMED.

Nancy Fearon-Hales appeals from a judgment entered October 21, 2005, in the United States District Court of the Southern District of New York (Laura Taylor Swain, *Judge*) following a jury trial, at the conclusion of which she was convicted of conspiracy to import more than one kilogram of heroin into the United States in violation of 21 U.S.C. § 963. We assume the parties' familiarity with the facts, procedural history, and issues on appeal. For the following reasons, we affirm.

Fearon-Hales first argues that the verdict was not supported by legally sufficient evidence proving her guilt beyond a reasonable doubt. Fearon-Hales's sufficiency claim rests on Alexander Becker's statement to the German police that his co-conspirator "Nancy" had scars under her eyes, which appellant does not, and Becker's failure to identify Fearon-Hales as his co-conspirator at trial.

This court must affirm the conviction if "*any* rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt." *United States v. Pierce*, 224 F.3d 158, 164 (2d Cir. 2000) (quoting *Jackson v. Virginia*, 443 U.S. 307, 319 (1979)). We must "consider the evidence in its totality, not in isolation." *United States v. Autuori*, 212 F.3d 105, 114 (2d Cir. 2000). In this case, a review of the record shows that the government presented other evidence at trial sufficient to support the jury's finding of guilt. The government presented six wiretapped conversations in which Nak Kusi, a drug courier, discussed

logistics for importing drugs with a woman referred to as "Auntie." At trial, Kusi identified the woman on the calls as Fearon-Hales, the government presented evidence that phone numbers used during the calls belonged to Fearon-Hales, and the jury was given the opportunity to compare the voice on the calls with an authenticated recording of Fearon-Hales's voice. The government also introduced evidence of a wire transfer payment to Kusi from Fearon-Hales's address and evidence that Fearon-Hales's travel coincided with the dates of the drug importation. Viewed in its totality, this evidence is sufficient such that a rational fact-finder could find Fearon-Hales guilty beyond a reasonable doubt.

Fearon-Hales also argues that the jury was not competent to compare voice recordings and attribute the voices on the wiretaps to her. Though defense counsel objected to allowing a translator to testify about his comparison of the voices, counsel did not ultimately object to the introduction of the MDC recording for jury comparison. In fact, in summation, defense counsel *encouraged* the jury to compare the two sets of recordings. We will not permit an appellant "to evade the consequences of an unsuccessful tactical decision" at trial. *United States v. Coonan*, 938 F.2d 1553, 1561 (2d Cir. 1991). Accordingly, we review the district court's ruling for plain error only. *See Caruolo v. John Crane, Inc.*, 226 F.3d 46, 55 (2d Cir. 2000). This standard supports reversal only where a district court's evidentiary ruling, which is always accorded substantial deference, was not only erroneous, but also "result[ed] in a miscarriage of justice or is an obvious instance of misapplied law." *Id.* (internal quotations marks omitted) (alteration in original). "[V]oice identification is not generally considered to be an area where expertise is

important." *United States v. Cambindo Valencia*, 609 F.2d 603, 640 (2d Cir. 1979). Thus the jury is generally competent to compare voice recordings with authenticated specimens, and no expert witness is required. *United States v. Sliker*, 751 F.2d 477, 500 (2d Cir. 1984). Accordingly, we hold that the District Court did not commit plain error in admitting an authenticated recording of Fearon-Hales's voice for comparison with the voice on the wiretapped calls.

Fearon-Hales also contends that Kusi, testifying by teleconference from Germany, was improperly coached by his attorney and the German interpreter. The record confirms that Kusi discussed a question regarding the dates of the drug smuggling trips with his attorney in Germany and the German interpreter prior to answering it. The record does not indicate, however, that the alleged coaching was intended to influence the witness's substantive testimony. Rather, the record shows that the incident in question arose due to confusion about a translation.

Fealon-Hales argues that this "coaching" makes Kusi's testimony unreliable. However, any improper coaching goes to the weight of the witness's testimony, not admissibility. The Supreme Court has noted that "opposing counsel . . . is not without weapons to cope with 'coached' witnesses." *Geders v. United States*, 425 U.S. 80, 89 (1976). "Skillful cross-examination could develop a record which the [counsel] in closing argument might well exploit by raising questions as to the [witness's] credibility, if it developed that [opposing] counsel had in fact coached the witness." *Id.* at 89-90. In this case, defense counsel had ample opportunity to cross-examine the witness and did in fact question the witness's credibility in closing arguments.

The District Court properly allowed the jury to determine how much weight to afford Kusi's testimony.

Finally, Fearon-Hales argues that the District Court's sentence of 151 months was unreasonable. She claims that she should have received a lower sentence because: (1) she has no prior criminal record; (2) she has a substantial and regular work history; (3) she is the mother of three children, one of whom is five years old; and (4) her co-conspirators received shorter sentences than she did.

Reviewing a sentence for reasonableness entails "consideration not only of the sentence itself, but also of the procedure employed in arriving at the sentence." *United States v. Fernandez*, 443 F.3d 19, 26 (2d Cir. 2006) (citing *United States v. Crosby*, 397 F.3d 103, 114 (2d Cir. 2005)). Notably, however, "[r]easonableness review does not entail the substitution of our judgment for that of the sentencing judge. Rather, the standard is akin to review for abuse of discretion." *Id.* at 27. Thus, this court considers whether the sentencing judge "exceeded the bounds of allowable discretion, . . . committed an error in law . . . , or made a clearly erroneous finding of fact." *Id.* (quoting *Crosby*, 397 F.3d at 114).

Under the statute, Fearon-Hales faced a mandatory minimum of 120 months' imprisonment and a maximum term of life imprisonment. 21 U.S.C. § 841(b)(1)(A). It is not disputed that the recommended sentence for Fealon-Hales's crime under the Sentencing Guidelines was 151 to 188 months' incarceration. This range reflects Fearon-Hales's lack of criminal history, her supervisory role, and the quantity of drugs involved. The record demonstrates that the District Court considered the requisite statutory sentencing factors as well as Fearon-Hales's lack of criminal record, her

family responsibilities, and her work history in sentencing Fearon-Hales to 151 months' imprisonment.

The record further reveals that the District Court did not misapprehend its discretion to impose a non-Guidelines sentence. *See Crosby*, 397 F.3d at 114 (Following *Booker*, "a sentencing judge would commit procedural error by mandatorily applying the applicable Guidelines range."). A lack of criminal record is not grounds for a non-Guidelines sentence, as the Guidelines range already takes into account prior criminal history. Family ties and favorable employment record are not ordinarily relevant in determining whether a departure from the Sentencing Guidelines is warranted, but following the Supreme Court's decision in *Booker*, the sentencing court has discretion to consider these factors. *See United States v. Jones*, 460 F.3d 191, 194 (2d Cir. 2006). "Although the sentencing judge is obliged to consider all of the sentencing factors outlined in section 3553(a), the judge is not prohibited from including in that consideration the judge's own sense of what is a fair and just sentence under all the circumstances." *Id.* at 195. The record does not suggest that the District Court failed to recognize this discretion. The District Court specifically noted that it had considered Fearon-Hales's family situation and work history, but balanced these concerns with other factors including the seriousness of the crime, the need for deterrence, the need to protect the public, and the need to avoid unwarranted sentencing disparities. Upon consideration of these factors, the District Court determined that a sentence at the low end of the Guidelines range was appropriate.

The fact that Fearon-Hales's two accomplices received lower sentences in Germany does not mandate a downward departure in the instant case. As a preliminary

matter, because this argument was not raised at sentencing, it is "forfeited on appeal and addressed only upon a showing that the court committed plain error." *United States v. Miller*, 263 F.3d 1, 4 (2d Cir. 2001). "For there to be 'plain error,' there must be (1) an error that (2) is 'plain' and (3) 'affect[s] substantial rights'; if these elements are satisfied, then the court may correct the error, but only if (4) the error 'seriously affect[s] the fairness, integrity, or public reputation of judicial proceedings.'" *Id.* (quoting *Johnson v. United States*, 520 U.S. 461, 467 (1996)).

One goal of the Sentencing Guidelines is to reduce unwarranted sentence disparities among federal defendants "with similar records who have been found guilty of similar conduct." *See United States v. Joyner*, 924 F.2d 454, 460 (2d Cir. 1991). However, the disparate sentences for Fearon-Hales and her accomplices are not unwarranted: Kusi and Becker were sentenced in Germany pursuant to German criminal law, they were couriers and Fearon-Hales their supervisor, and they plead guilty and cooperated with the government while Fearon-Hales did not. Moreover, we have held that the desire to avoid disparate sentences for co-conspirators is not a permissible basis for a departure because it would necessarily undermine national uniformity. *Id.* at 460-461 ("To reduce the sentence by a departure because the judge believes that the applicable range punishes the defendant too severely compared to a co-defendant creates a new and entirely unwarranted disparity between the defendant's sentence and that of all similarly situated defendants throughout the country."). Thus the District Court's decision not to downwardly depart on the basis of the sentences given to Fearon-Hales's accomplices did not constitute plain error.

For the foregoing reasons, we AFFIRM.

FOR THE COURT:

Thomas Asreen Acting Clerk

By: /s/ Lucille Carr